WHOSE SPECTRUM IS IT ANYWAY?

HISTORICAL STUDY OF

Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing

1950 TO PRESENT

Prepared for
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Federal Communications Commission
by
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I. EXECUTIVE SUMMARY

A. Overview

As part of the Federal Communications Commission's mandate to identify and eliminate market entry barriers for small businesses under Section 257 of the Telecommunications Act of 1996 (hereafter referred to as "1996 Act"), and its mandate to further opportunities in the allocation of spectrum-based services for small businesses and businesses owned by women and minorities under Section 309(j) of the Communications Act of 1934, the Commission commissioned Ivy Planning Group, LLC[1] to conduct this historical study of barriers to entry into broadcast and wireless licensing experienced by small, minority- and women-owned businesses from 1950 to the present. This study is the first FCC-sponsored historical, anecdotal, qualitative review of the subject.

Other statistical or quantitative studies have focused on this subject matter and have often revealed similar findings.[2] However, this study offers different insights - the stories - of African-Americans, Hispanics, Native Americans, Asian Americans, and Caucasians who have encountered market entry barriers. It is important to hear from real people about their experiences in order to create context and meaning for the data that is provided from other sources.

This study was designed to put a face on and give a voice to the process of obtaining a broadcast or wireless license. By creating a venue for these voices, the study allows people to say what their experiences were. Each participant provided his or her story independently. Some stories were fragmented and less coherent, while others were articulated clearly and concisely. While the stories vary by year, length, race, gender, circumstance, and narrator, their respective voices provide distinctive yet recurring themes on identifiable market entry barriers. In every case, the stories provide qualitative clarity and specificity to understand the process of obtaining a broadcast or wireless license from 1950 to the present.

Ivy conducted individual telephone interviews with 120 key persons representing small, minority- and women-owned businesses that attempted (successfully or not) to acquire, sell or transfer a license during the years 1950 – present, and 30 telephone interviews with key market participants (e.g., media brokers, lenders, attorneys, industry leaders, and/or FCC officials). The findings indicate that there are unique and significant barriers to entry for small, minority- and women-owned businesses.

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[1] The Commission contracted with the Ivy Planning Group, LLC to do this study pursuant to Purchase Order No. PUR00000292, Requisition No. AUC00000135, under the GSA MOBIS schedule GS-23F-9805H.

[2] *See, e.g. Civil Rights Forum on Communications Policy, When Being No. 1 Is Not Enough (1999); and R. Suarez and R. Cull, Capital Formation and Investment in Minority Business Enterprises in the Telecommunications Industries (1995).*

B. Summary of Key Findings

Regardless of the tone and tenor of the many voices of this study, a troubling story line resonates among the interview stories that span a half-century. Women and minorities faced pervasive discrimination, as well as small business market entry barriers, particularly in the fifties and sixties. The FCC attempted to ameliorate that discrimination in the seventies, eighties and early nineties through the tax certificate, distress sales, comparative merit, and lottery preferences.

Minorities and women made modest gains in broadcast ownership during this period, amidst persistent capital market discrimination and other small business market entry barriers. However, those gains were essentially reversed, in 1995, by both Congress's elimination of the tax certificate program and the Supreme Court's decision in Adarand, which made it significantly more difficult for race-specific rules and policies to be implemented by the FCC. The deregulation and the lifting of the ownership caps under the Telecommunications Act of 1996 made these barriers nearly insurmountable for small, minority- and women-owned businesses attempting to thrive or even enter the broadcast industry.

The FCC's and Congress' actions or inaction on particular regulatory or market issues have exacerbated those barriers. These actions and inaction include: the uneven enforcement of EEO policy; under utilized distress sales/license renewals; repeal of the tax certificate program; permitting use by non-minority men of minority and female "fronts" during the comparative hearing process; the lifting of the ownership caps; and minimal small business advocacy before the FCC.

Today small firms face barriers erected by deregulation and consolidation in both wireless and broadcast. Minorities and women confront those same barriers; and yet those obstacles stand high atop a persistent legacy of discrimination in the capital markets, industry, advertising, and community--and prior FCC policies, which worsened the effects of discrimination.

Based on those interviews, the findings revealed several factors that impeded and/or precluded small, minority-and women-owned businesses from entering, successfully competing and surviving in the broadcast and wireless industries including:

- Discrimination in the capital markets causing limited access to debt and equity capital that would be adequate and affordable for minority-and women-owned businesses;
- Discrimination from the advertising industry against minority-owned and –formatted stations; exclusion of minority and women-owned businesses from the powerful network of information, deals and deal makers;
- Market deregulation and consolidation caused by the 1996 Act;

- Lack of industry experience for women and minorities due to few employment opportunities offered by majority broadcasters and the failure of the FCC to enforce EEO rules;

- Fractured or a lack of advocacy of small, minority- and women-owned communications businesses before the FCC, the courts and Congress;

- Misuse of minority and gender ownership programs by non-minority firms to the disadvantage of female and minority ownership;

- Congressional laws, court rulings, and FCC rules, regulations and policies, which have operated to the detriment of small, minority- and women-owned businesses.

C. Key Conclusions

Based on the shared experiences and perspectives of the study participants, Ivy has formed nine key conclusions concerning past, present and prospective market entry barriers:

(1) Access to the capital markets is critical to the success of small, minority- and women-owned businesses;

(2) There is an absence of a necessary critical mass of small, minority- and women-owned businesses in broadcast and wireless ownership;

(3) Congress and the FCC erected and heightened market entry barriers inhibiting the establishment, growth and development of small, minority- and women-owned businesses;

(4) Discrimination played an important role as an entry barrier, especially with respect to minority participation in broadcasting;

(5) Bidding credits designed to increase the opportunities for participation in wireless auctions by small, minority- and women-owned businesses were ineffective and unsuccessful;

(6) The relaxation of ownership caps has significantly decreased the number of small, women- and minority-owned businesses in this industry;

(7) The declining participation of small, women- and minority-owned businesses in this industry has resulted in diminished community service and diversity of viewpoints;

(8) The declining participation of small, women- and minority-owned businesses in this industry has also resulted in a loss of civic participation, democratic values and freedom of speech; and,

(9) The FCC often failed in its role of public trustee of the broadcast and wireless spectrum by not properly taking into account the effect of its programs on small, minority- and women-owned businesses.

A single question may be heard amidst the many stories, recommendations, commendations, complaints, and perspectives offered: whose spectrum is it anyway? In answering the question, the interviewees consistently responded that spectrum is a public good to be managed by the FCC in the public interest. While interview subjects believe that maximizing auction revenue for the public purse is important, it is equally in the public interest to promote ownership diversity, preserve viewpoint diversity, and eliminate market entry barriers.

II. INTRODUCTION

A. Purpose, Statutory Authority and Legal Basis

The purpose of this study is to provide a historical perspective on what market entry barriers, if any, small, minority- and women-owned businesses have faced in the acquisition, sale or transfer of FCC broadcast and wireless licenses. The study was designed to assist the FCC in implementing Section 257 of the Telecommunications Act of 1996, 47 U.S.C. §257[3], which mandates that the FCC identify and eliminate market entry barriers for small telecommunications businesses, and Section 309(j) of the Communications Act of 1934, which requires the FCC to further opportunities in the allocation of spectrum-based services for small businesses and businesses owned by women and minorities.[4]

In addition, this study will assist the Commission in determining whether there is any evidence of discrimination that may establish a compelling governmental interest under Adarand v. Pena, 515 U.S. 200 (1995).

In Adarand the Supreme Court held that any federal program that uses racial or ethnic criteria as a basis for decision-making must serve a compelling governmental interest such as remedying past discrimination, and must be narrowly tailored to serve that interest. In order to demonstrate such an interest, the government cannot rely on general societal discrimination. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509 (1989). Instead, the government must establish that it is remedying either its own discrimination, or discrimination in the private sector in which the government has become a "passive participant." Croson, 488 U.S. at 504.[5]

Furthermore, the study was designed, inter alia, to assist the Commission in determining whether the FCC is or has been a passive participant to discrimination in the private market. Accordingly, the study will help determine whether there is the factual predicate and legal premise to adopt programs encouraging women and minority ownership of FCC licenses. Moreover, the study will enable the Commission to gather anecdotal evidence of discrimination, if any, faced by small, minority- or women-owned communications businesses.

Section 257(a) of the 1996 Act, requires the Commission to complete a proceeding for the purpose of identifying and eliminating market entry barriers for entrepreneurs and other small businesses in telecommunications and information services. To meet this mandate, the Commission initiated an omnibus Section 257 proceeding by adopting a notice of inquiry to identify and eliminate barriers for small businesses. *See Market Entry Barriers Notice of Inquiry*,

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[3] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), Section 257.

[4] In addition, the Commission has full authority and power to conduct an inquiry for "any question [that] arise under any of the provisions of [the] Act" pursuant to Section 403 of the Act.

[5] We note that gender-based classifications need only satisfy intermediate scrutiny. *See United States v. Virginia*, 518 U.S. 515, 531-33 (1996).

11 FCC Rcd 6280 (1996)(NOI).[6] In this *NOI*, the Commission requested comments on, among other things, whether minority- and women-owned businesses encounter "unique" obstacles in the telecommunications market, and determined that discrimination could be a market entry barrier.[7] Following the *NOI*, the Commission released a *Section 257 Report* regarding the agency's implementation of Section 257,[8] wherein the Commission identified several obstacles that small businesses encounter, including access to capital, access to Commission decision makers, access to information, and Commission procedure.[9] The report also addressed the Commission's commitment to identify and remove market barriers experienced by women or minorities, but determined that the agency would have to fully evaluate the record to ensure compliance with constitutional requirements before the agency could take any action. The FCC, then, commenced a comprehensive examination, a series of market entry barrier studies, to further examine the participation of small businesses, including those owned by women and minorities in the provision of telecommunications services and the impact of the Commission's policies on access to the telecommunications industry.

In rare cases, anecdotal evidence alone may be sufficient to constitute a compelling governmental interest. See *Wessmann v. Gittens*, 160 F.3d 790, 801 (1st Cir. 1998)("anecdotal evidence alone can establish institutional discrimination that could serve as basis for race-conscious action....only in the most exceptional circumstances."); *Engineering Contractors Association*, 122 F.3d 895, 925 (11th Cir. 1997)(anecdotal evidence standing alone in rare cases will suffice); *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991). In any event, the Supreme Court has recognized that anecdotal evidence of discrimination is important because it can "bring the cold numbers convincingly to life." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 339 (1977).

Accordingly, this qualitative, anecdotal study is part of the Commission's comprehensive examination regarding market entry barriers and was commenced in conjunction with several statistical studies[10] and is designed to complement, illuminate and reinforce the findings of those quantitative studies.

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[6] In addition, The Commission's Office of Communications Business Opportunities (OCBO) and its Office of General Counsel (OGC) held a *Market Entry Barriers Forum* to further explore impediments that small businesses experience.[6] *See FCC Public Notice, Forum on Small Business Market Entry Barriers,* No. 64975 (Sept. 5, 1996) (Market Entry Barriers Forum)(hearing was held on September 24, 1996).

[7] Id. at 6283.

[8] *In the Matter of Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Business*, Report, 12 FCC Rcd 16802 (1997).

[9] Id. at 16824-34.

[10] These studies examine: (i) whether there is a link between minority broadcast ownership and news and public affairs programming; (ii) the utilization ratios and probabilities of success in wireless auctions for minorities, women, and non-minorities; and the impact, if any, of capital market discrimination on Broadcast and wireless spectrum business opportunities for minorities

B. Historical Snapshot

The Communications Act of 1934 created the Federal Communications Commission and provided the means and purpose of allocating frequency along the radio spectrum. While the mission of the Agency has generally remained the same, the FCC has used several different means of spectrum allocation.

From 1950 until 1993 the FCC awarded licenses to mutually exclusive competing broadcast applications through comparative hearings. If only one applicant applied, "a singleton", the FCC awarded the license to that applicant without a hearing, provided the applicant met minimum requirements. The FCC began distributing wireless licenses by lotteries in 1982. Since 1993, the FCC allocates wireless licenses, for commercial use, solely by means of auction. Starting in 1999, broadcast licenses have also been awarded solely through auctions.

In addition to being awarded a license directly by the FCC, an active secondary market for licenses exists wherein they are bought and sold independent of the FCC. Except for requiring FCC approval, the Commission is not generally involved in these transactions.

At varying times and through varying means (see Statutory, Regulatory and Historical Timeline at Appendix A), ownership programs have been made available to small, minority- and women-owned businesses to provide increased opportunities for them to participate in both broadcast and wireless license ownership. For licenses obtained from the FCC, various ownership programs have enhanced the comparative hearing, lottery and auction processes. In the secondary market, tax certificates and distress sales have been implemented as opportunity-creating mechanisms for small, minority and women licensees.

For essentially the first half of the 20th century, the broadcast industry was dominated by White males. Most stations were owned by large corporations such as CBS and NBC and had been awarded by the government at no cost to the licensee. The advantages and opportunities created by the initial award process provide the foundation for today's telecommunication industry.

There was virtually nothing like today's ethnic programming on the air. As late as 1943, radio still upheld its longstanding policy that African-Americans, in contrast to Whites, would not be referred to as Mr., Mrs., or Miss on any commercial network show. Furthermore, African-Americans were portrayed on the air as servants or as comical or ignorant characters.

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and women; (iii) the estimation of utilization ratios and probabilities of obtaining broadcast licenses from the FCC through the comparative hearing process; and (iv) the impact of advertising practices on minority-owned and minority-formatted broadcast stations.

Against this backdrop, the following list of "firsts" is offered.

- In 1922, Marie Zimmerman became the first White woman to own a radio license.[11]

- "In 1947, station WDIA-AM in Memphis, Tennessee, became the first radio station to devote all its air time to Black programs."[12]

- It was not until 1949, when Jesse B. Blayton purchased WERD in the secondary market in Atlanta, that the industry had its first Black radio station owner.[13]

- In 1960, Andrew Langston, a Black man, started his more than 13-year process of acquiring a radio broadcast license from the FCC through a comparative hearing. It was the first time that an African-American had filed an application with the FCC. Mr. Langston was finally awarded his license in 1974.

- In 1973, the FCC issued a construction permit to WGPR-TV (UHF) in Detroit, the first Black owned television station.[14]

- The first Hispanic station opened in the middle 1950s. The record of ownership is uncertain; the station operated in the southwestern section of the United States, in either Texas or New Mexico.

- In 1989, after four years in a comparative hearing, Dorothy Brunson became the first African-American woman to own a television station.

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[11] Halper, Donna. Marie Zimmerman – Broadcasting's First Female Owner. <http://www.oldradio.com/archives/people/zimmerman.html>.

[12] Alston, Roland (1978, July). Black-Owned Radio: Talking to the Airwaves in a Hurry. *Black Enterprise*, p. 22.

[13] Id., p.23.

[14] Molden, Vaughncille. Telecommunications and Black Americans: A survey of Ownership, Participation and Control. Washington University: St. Louis, Missouri. August 1975, p. 128. Master of Arts Thesis.

III. METHODOLOGY

Ivy Planning Group, LLC conducted 150 telephone interviews during a four-month period.[15] The study analyzes these interviews, 123 of which were with key persons[16] representing small, minority- and women-owned businesses that attempted to acquire, sell or transfer a license during the years 1950 to present, irrespective of success; and 27 of which were with "key market participants"[17] active in the broadcast and/or wireless markets during the same time frame.[18]

We selected a total of 150 interviewees to enable us to talk to a meaningful cross-section of participants in the licensing process from 1950 to present. (See Appendix C for a chart highlighting the demographic breakdown of the interviewees).

Using a knowledge of the market and random sampling, a list of interviewees was compiled relying upon various sources.[19] Approximately half of the interviewees who were licensees were selected based on their role and significance in the industry. The balance of the licensees and unsuccessful applicants were selected at random from the information sources available to us.

As we compiled the list of interviewees, we made every effort to ensure representation by year, method of license acquisition, type of license, type of FCC acquisition rules, race/ethnicity, gender, and size of business. We acquired some of this information through the aforementioned data sources; our initial conversations with prospective interviewees provided us with the remainder.

The list of key market participants was comprised of a sample of people who are known to have had a significant role in the industry and those participants whose names arose during the

[15] *See Appendix* C for a copy of the Interview Guide.

[16] "Key persons" are defined as those who: (1) have voting control or an equity interest in the company which holds the license and (2) were a driving force behind the company's acquisition of or attempt to acquire a FCC license on either the primary or secondary market.

[17] "Key market participants" are defined as those individuals who act in an intermediary capacity with respect to FCC broadcast and wireless license acquisition (e.g., media brokers, lenders, venture capitalists, investment bankers, and attorneys) or who are or were part of the FCC (e.g., former Commissioners, Directors, staff members).

[18] With the consent of the interviewees, telephone interviews were recorded and subsequently transcribed. Parenthetical notations after each quote in this document refer to the particular transcript file and page number(s) from which the quote was taken.

[19] Sources used included the following: FCC database and other information; National Telecommunications and Information Administration (NTIA) Minority Commercial Broadcast Ownership Report, 1997-1998; Broadcast Investment Analysts (BIA) databases; American Women in Radio and Television (AWRT); National Association of Black-Owned Broadcasters (NABOB); and referrals from interviewees.

interview process. Key market participants and current licensees identified earlier generations of licensees and applicants.

As a further part of the study, Ivy developed a timeline of key statutory, regulatory and historical developments which have affected the efforts of small, minority- or women-owned businesses to obtain licenses in both the primary and secondary markets. The timeline includes rules, policies, court cases, and statutory regulations that impacted comparative hearings, lotteries, auctions, bidding credits, tax certificates, and distress sales. Further, the timeline includes the number of small, women and minority licensees for selected years between 1950 and present, when available. (The Historical Timeline is attached as Appendix A.)

The analysis of the interviews combined with the information contained in the historical timeline form the basis of this report.

IV. FINDINGS

A. Overview

The findings of this study may assist the FCC in fulfilling its statutory mandate regarding market entry barriers. Section 257 of the 1996 Act mandates that the Federal Communications Commission ("FCC" or "the Commission") identify and eliminate "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services."

In carrying out the mandate, Section 257(b) states that the Commission "shall seek to promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience and necessity." In addition, Section 309(j) of the Communications Act of 1934 requires the FCC to further "economic opportunity for a wide variety of applicants, including businesses owned by members of minority groups and women."

The study's findings highlight significant barriers to entry for small businesses including minority- and women-owned businesses. The interviewees uniformly reported that the combination of these barriers has impeded and in many instances precluded these entities from entering, successfully competing and surviving in the broadcast and wireless industries. Interviewees specifically identified the following as market entry barriers.

- Discrimination in the capital markets causing limited access to adequate and affordable debt and equity capital for minority- and women-owned businesses;
- Discrimination from the advertising industry against minority-formatted and -owned stations resulting in decreased opportunity for revenue generation, cash flow and access to capital;
- Exclusion of minority- and women-owned businesses from the powerful network of information, deals and deal makers thereby limiting access to license purchase opportunities and the capital to fund them;
- Market deregulation and consolidation following the 1996 Act resulting in increased competition for national advertising dollars, inflated purchase prices for stations and a loss of diversity of voices and community focus;
- Lack of industry experience for women and minorities resulting from too few employment opportunities offered by majority broadcasters and the uneven enforcement by the FCC of its EEO policies, thus rendering these groups ill-prepared to compete in a marketplace where industry experience and successful track records are critical elements for market entry and acquisition of capital;

- Fractured or lack of advocacy by and on behalf of small, minority- and women-owned communications businesses before and within the FCC, the courts and Congress, thereby leaving the special needs of these licensees under-represented when new rules, policies and laws are proposed;
- A series of FCC actions and inactions which have proven very costly for small, minority- and women-owned businesses, who could ill-afford the added financial burden, and have frequently had a discriminatory impact on these business owners, albeit purportedly unintentional; and
- Misuse of minority and gender ownership policies by majority firms, to the disadvantage of "real" minority and female ownership.

This study covers both broadcast and wireless licensing. Background information on each is presented below to provide context for the discussion of the findings.

1. Broadcasting

Small, minority- and women-owned broadcast licensees and those wanting to enter into broadcasting face significant barriers to entry and growth in today's market. While there have always been challenges, and especially for women and minorities, the relaxation of ownership restrictions or "caps" by the 1996 Act has changed the landscape of broadcast properties because the statute allows a single entity to own, given the applicable market, a larger number of stations nationwide.

Historically, small broadcasters have served their local markets with a commitment to provide service to their respective geographic or demographic communities, gaining advertising revenue from both national and local businesses. From 1950 until 1985, there was healthy competition among broadcast stations. An individual or company could own only <u>one</u> AM, FM and television station in each market and a total of seven of each type nationally.[20] In stark contrast,

[20] In 1985, while the rules generally stayed the same with respect to local ownership, the Commission relaxed the rules so that an individual or company could own as many as 12 AM, FM or TV stations in the national market under certain circumstances. In addition, since 1985, the Commission has gradually relaxed the ownership rules. In 1992, one could own 2 AM and 2FM stations, in markets with 15 or more stations, provided the combined share of audience is less than 25%; in markets that have less than 15 stations, 3 stations with no more than 50% of the market's stations. In the national market, an owner could own 18 AM and 18FM stations, plus a non-controlling interest in 3 AM and 3 FM, provided they are controlled by minorities. Thereafter, in 1996, the Commission removed the ownership restriction allowing no numerical-station limit, but limiting the audience reach to 35% as to the national market. The FCC also relaxed the local ownership rules:

(a) 8 stations in markets with 45 or more stations (with no more than 5 stations in AM or FM;
(b) 7 radio stations in markets with 30-44 stations (with no more than 4 in either service);

today, an individual or company can own as many as 8 stations locally, based on the total number of stations in the local market; and there is no numerical limit in the national market but a limit on audience reach. In earlier years when there were more stringent restrictions on broadcast ownership, small business owners were at least making a living. Now it is significantly more difficult to do so.

While a number of interviewees had acquired their licenses through the FCC's comparative hearing process[21], most of the study participants had purchased their stations from previous license holders. Many of those stations had inferior signals and were purchased out of

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(c) 6 radio stations in markets with 15-29 stations (with no more than 4 stations in either service); and

(d) in markets with less than 15 stations, 5 radio stations (with no more than 3 stations in either service.

[21] In accordance with the Communications Act of 1934, The Federal Communications Commission has allocated and licensed the radio spectrum for use in radio, television and telecommunications. From 1945 until 1993, this spectrum was allocated by comparative hearings from which the successful applicant paid no compensation to the Federal government. If there were mutually-exclusive competing applicants, they went through the comparative hearing process wherein an Administrative Law Judge (ALJ) reviewed the applications and heard the arguments from the applicants, ultimately deciding which one could and would best serve the public interest. While the applicants generally expended significant sums of money for engineering advice and legal representation during the application and hearing process, regulatory and application fees were minimal.

In an effort to refine the process and to provide consistency in decision making, the Commission issued the Policy Statement on Broadcast Comparative Hearings, 1 F.C.C. 2d 393 (1965). This Statement articulated the areas in which applicants would receive credit (or "points") and on which their applications would be judged. The seven areas of review were: diversification of control, integration of ownership into management, proposed program service, past broadcast record, efficient use of the frequency, character, and any other significant and relevant factors to be considered in the decision-making process.

Minority ownership policies did not commence until 1973 in the wake of *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973); and gender ownership policies did not commence until 1978 and the *Mid-Florida Television Corp.*, 69 F.C.C. 2d 607, 651 (Rev. Bd. 1978), set aside on other grounds, 87 F.C.C. 2d 203 (1981).

The 1978 Statement of Policy on Minority Ownership of Broadcasting Facilities formalized the use of minority and gender credits in the comparative hearing process, thereby providing a measure of "preference" to both minority and female applicants. In 1990, the FCC declined to extend enhancement credits for minority ownership under the diversification of ownership criterion. The 1993 decision, *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993), had the effect of freezing comparative hearings. The Telecommunications Act of 1996 eliminated the role of comparative hearings in the renewal of broadcast licenses.

bankruptcy, with the new owner, in his or her eagerness to own a station, sometimes taking on more debt than was prudent.

Access to capital, on a timely basis and in quantities needed to acquire and grow their businesses, has always been a challenge for small broadcasting businesses. Local banks often did not lend on broadcast properties because bankers did not understand the business of radio and television, saw the licenses as too risky (especially since they were not actually owned by the broadcaster and came up for renewal on a regular basis), and were unable and/or unwilling to collateralize their loans with the generally meager assets of the stations themselves. If broadcasters were able to get loans from conventional lenders, often other personal assets had to be pledged as collateral. If one was lucky, the seller of the station was willing to take back a note for a portion of the purchase price.

The interviewees consistently reported that for minority and women licensees these market entry barriers have been compounded by the discrimination they have encountered in the capital markets, in the broadcasting industry itself, in the advertising industry, in the lack of employment opportunities, and as a result of various actions and inaction on the part of the FCC and Congress.

The 1996 Act has heightened these barriers to the point where it appears that it is almost impossible for small, minority- and women-owned businesses to enter the broadcast industry. Broadcast ownership is now determined by Wall Street stock instead of Main Street money. With the lifting of the ownership caps, there has been consolidation of ownership, primarily in radio, by large publicly-traded companies, driving prices up and smaller, independent owners out. Where stations used to sell for between seven and twelve times projected cash flow, prices have now been inflated to 20-22 times cash flow. Without significant equity capital, either from personal funds or outside investors, it is virtually impossible for individuals and non-public companies to acquire stations in today's market.

The consolidation of stations precipitated by the deregulatory provisions of the 1996 Act has also consolidated advertising revenues in the hands of the large broadcast group owners, significantly limiting the ability of smaller broadcasters to earn the money necessary to successfully compete and survive in the business. As a result, smaller station owners, many of whom are minorities, are being presented with two choices: (1) to continue to operate their stations at personal financial risk, which many have done because of their deep commitment to serve and be a voice for their communities, or (2) to sell their stations, which others have done because they believe that it is going to be extremely difficult if not impossible to compete successfully against these large group owners in the future.

With the exit of local, minority radio station owners, consolidation is also having an impact on both the diversity of voices and service to the local communities. With consolidation, the programming, both entertainment and public interest, has become more homogenized. While group owners might have urban-formatted ("Black") stations, for example, in particular markets, interviewees indicated that it is common for the news and community service programming provided by these stations to not be particularly geared towards the information needs of that specific Black community itself.

Additionally, since news programming was often being produced centrally by the larger companies whose stations covered multiple markets, access by the audience to general local news and public service announcements was diminished. Lastly, fewer opportunities exist for the voice of the minority population to be heard since some minority on-air personalities and other employees are being precluded by their employers from taking public stands on issues relative to their minority group.

These market entry barriers have been exacerbated by the FCC's action, or inaction, on certain regulatory or market issues. For example, they may include enforcement or unenforcement of EEO policy, distress sales/license renewals[22], use by non-minority men of minority and female "fronts" during the comparative hearing process[23], the lifting of the ownership caps, and minimal small business advocacy before the FCC. The actions and inactions of the FCC have been made worse with Congress' repeal of the tax certificate program.[24]

[22] The 1978 Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C. 2d at 981, 42 Rad. Reg. 2d (P & F) at 1691, created the Distress Sale policy which allowed for license owners that were under scrutiny by the FCC (and under threat of license revocation) to sell their station to a minority for 75% of the appraised value. In return, the FCC would cease its inquiry into the suspect license owner.

[23] Interviewees reported that in some instances non-minority men would offer ownership and/or financial resources to minorities and women to become part of their license application team in order to take advantage of the minority and women ownership programs during the comparative hearing process, but rarely giving these "fronts" control over the operation of the business. In these instances, their participation was generally sought after to increase the odds of license award. Alternatively, others would review FCC filings to see if a minority or woman had filed for a new frequency. The apparent motivation was either to: (a) get paid off with "greenmail" to withdraw their application, knowing full well that most women and minorities did not have the resources for a protracted hearing before the Commission and would therefore pay the greenmailer to go away; or (b) come in on the back of someone else's engineering study and wear down the minority or female applicant through appeals or other means, expecting that this applicant would eventually withdraw because he/she did not have the money for a protracted hearing process, thereby leaving the non-minority in a position to receive the license. There were instances where these practices, as described, were quite predatory in their nature.

[24] The 1978 Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C. 2d at 981, 42 Rad. Reg. 2d (P & F) at 1691, created the tax certificate program. This program which provided incentives to broadcast owners who sold their properties to minorities (minority buyer with 50.1% of voting control and 20.1% equity interest). The seller could then defer any gain realized on the sale of that broadcast property provided it was sold to a minority, and the gain was rolled over into a qualified replacement broadcast property within 2 years. Specifically, the tax certificate program encouraged and promoted minority ownership by giving a two-year like-kind-transfer tax break for the sale of licenses to minorities if the proceeds were reinvested in a

And finally, the gains in station ownership that had been achieved by minorities in the latter 1970s, 1980s and early 1990s were essentially reversed by both Congress's elimination of the tax certificate program in 1995 and Adarand decision in 1995, discussed supra, which made it significantly more difficult for race-specific rules and policies to be implemented by the FCC.

Given the historical disadvantages faced by small, minority- and women-owned broadcasting businesses, the confluence of the repeal of tax certificates in 1995, the Adarand decision in 1995 and the deregulation of the broadcast industry in 1996, it appears that it is nearly impossible for small, minority- and women-owned broadcasters to enter, survive and grow in the broadcast industry.

2. Wireless

The barrier to entry in wireless licensing is primarily one of capital. With the passing by Congress of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 388 (1993) (codified, in pertinent part, at 47 U.S.C. §390(j) (1994)), the FCC was given the authority to distribute licenses through a competitive bidding process, or auction. With the enactment of Section 309(j) of the Communications Act, successful license applicants have to pay the FCC for the issuance of wireless licenses whereas before they were issued at no charge to the licensee.[25]

The financial burden of now having to pay for licenses coupled with 1) the enormous sums of capital needed to build out wireless systems and 2) limited access to capital, has severely disadvantaged small, minority- and women-owned businesses in the acquisition of wireless licenses.

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similar communications industry. Since the seller was able to defer its tax payment on the capital gain by selling to a minority, the price was frequently lowered, enabling minority purchasers to mitigate the associated barrier of "lack of access to capital."

Prior to 1978, minorities owned approximately 40 broadcast licenses, one-half of one percent of approximately 8,500 total broadcast licenses granted by the Commission. From 1978 to 1995, the FCC granted approximately 356 tax certificates to promote minority broadcast and cable ownership (287 radio, 40 TV and 30 cable licenses). This program helped give a much needed boost for minority ownership. In 1982, the tax certificate program was expanded to include cable systems. Subsequently, Congress repealed the tax certificate program with the passing of the Self-Employed Persons Health Insurance Act of 1995, Pub L. No. 104-7, S 2, 109 Stat. 93 (1995).

[25] On August 18, 1998, the Commission released its First Report and Order setting forth procedures governing auctions of broadcast service licenses. In October 1999, the FCC held its first auction for broadcast licenses whose distribution was suspended in the wake of the *Bechtel* case.

Furthermore, the elimination of auction ownership programs for women and members of minority groups as a result of the Adarand case, has caused access to outside equity investors and vendor financing for equipment to practically disappear.

A more detailed discussion of these barriers in both broadcast and wireless licensing is presented below.

B. Market Entry Barriers and Other Experiences

Through the years covered by this study, small, minority- and women-owned businesses in both broadcasting and wireless telecommunications encountered multiple market entry barriers. They were erected by discrimination in the capital markets, in communities, in the advertising industry, and in the competitive marketplace; by the effects of deregulation and market consolidation precipitated by the 1996 Act; and by various actions and inaction on the part of the FCC, the courts and Congress. It is important to note that while essentially all small businesses were negatively affected by these barriers, those businesses owned by women and especially those owned by minorities reported the greatest negative impact.

1. Discrimination in Lending and Limited Access to Capital

> ***Access to Capital is Key***

. . . (O)ur number one criteria ... is can they pay for it at the closing and will they pay the most. And that kind of supersedes everything. (Brian Cobb, media broker - BCobb512, p. 13)

Access to capital was clearly the most common and pervasive barrier to entry cited by participants in our study, both among licensees, as well as by most every key market participant (broker, lender, other intermediaries). In a market where access to capital is a critical component for entry and growth, lack thereof basically puts you out of the game. Acquiring money for start-up ventures is difficult enough. If one is a woman or minority, the difficulties in acquiring capital, as the female and minority study participants told us, were exacerbated by discrimination on behalf of the various lending sources and intermediaries.

> ***Access to Capital as an Obstacle for Small Business***

Capital affects everything. The more cash-strapped a company is, the less it is able to invest in those things that help it grow and keep it viable. These things include attracting and retaining top personnel; operating out of comfortable, efficient facilities; upgrading to and maintaining state-of-the-art equipment; retaining attorneys to ensure information flow and advocacy;